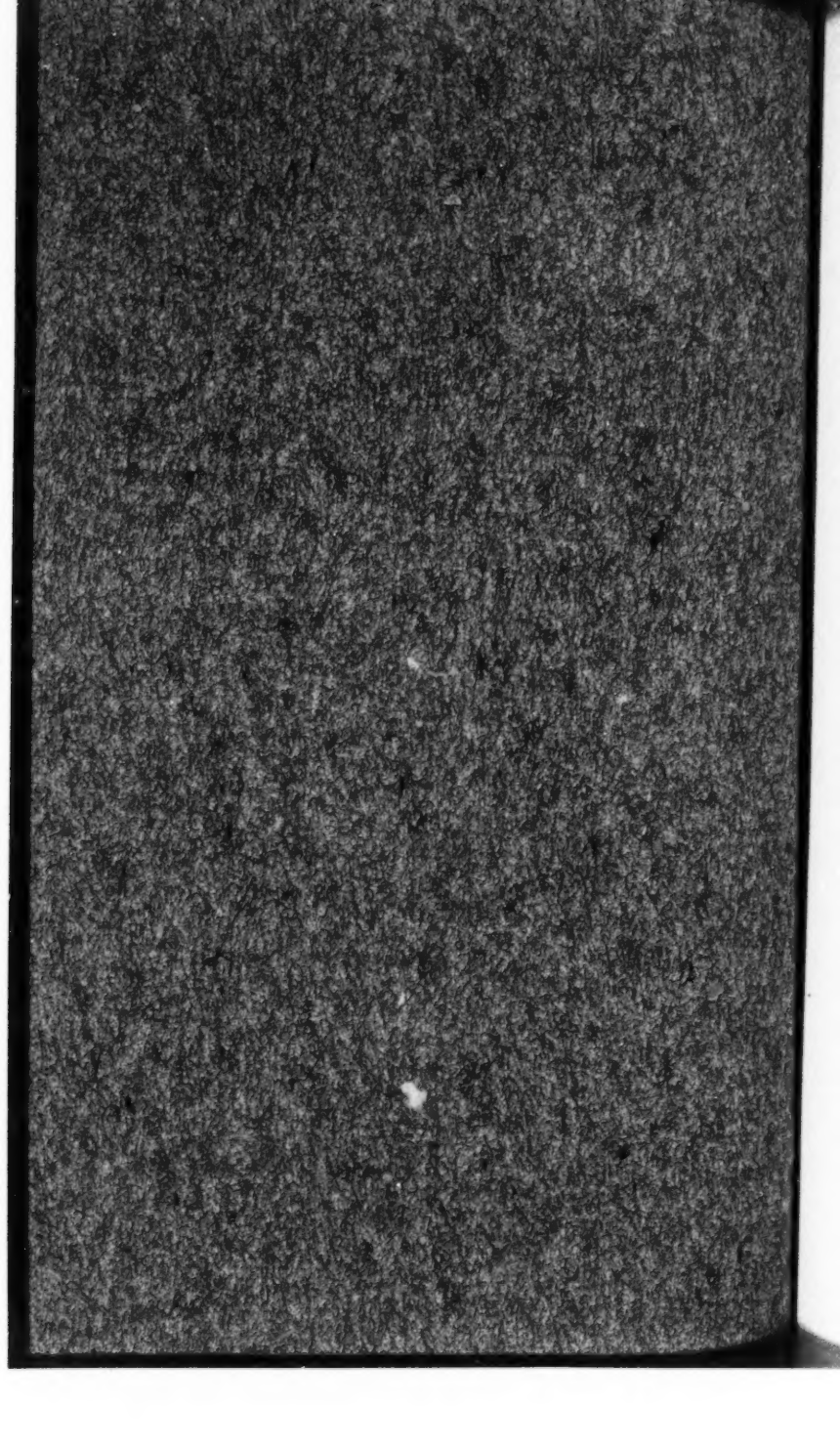
Supreme Court of the United States

Brief of Respondent

Rosen & Rosen



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 109.

BUTTE CITY WATER COMPANY,
Plaintiff in Error,
vs.
BEN BAKER.
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action in ejectment, brought by Ben Baker against the plaintiff in error to recover possession of the Keynote Lode Claim, in Highland Mining District, Silver Bow County, Montana; the plaintiff alleged ownership in himself, and an ouster by the defendant, the plaintiff in error (pp. 2-3).

The defendant denied the ownership of the plaintiff, and alleged title in itself to the premises in question (pp. 3-4).

Upon these issues the case was tried in the District Court before a jury.

The plaintiff, Baker, introduced proof of his title by showing a location of the premises under the mineral laws of the United States. He showed what had been done

toward making the location upon the ground (p. 5), and then showed his record of the location (pp. 6-7). There was some question as to the locus of the claim, but these questions are not of importance in this court.

The defendant, Butte City Water Company, undertook to show a location of the same premises by a prior appropriation to that of *plaintiff*, under the name of the Keyno lode claim. This location was made by John T. Lewis, the predecessor in interest of the Butte City Water Company. In order to establish the location John T. Lewis, the original locator, was called, and testified as to the discovery upon the Keyno lode claim, and as to marking the boundaries on the ground by stakes (pp. 17, 18, 19). M. L. McDonald, an engineer, was also called (p. 20), who testified as to the boundaries of the Keyno claim, and as to how they were marked. Several other witnesses were called to show the markings of the Keyno claim, and to show a shifting of the stakes marking the boundaries of the Keyno claim.

After proof of the marking of the boundaries of the Keyno claim the defendant offered in evidence the record of the Keyno claim (p. 19). This was objected to, first, because it does not comply with Section 3611 of the Political Code of Montana, in that it does not show that a well-defined crevice and one wall of the ledge had been discovered; second, in that it does not comply with Section 3612 of the Political Code, because it fails to show the general course of the work done under subdivision 4; under subdivision 6 it fails to describe the discovery shaft, or the discovery work done; under subdivision 7 of said section, in failing to properly describe the corners or the markings thereon; in describing a blazed tree; and not a blazed tree in place; in describing the same

corner as a post, and as a blazed tree; in failing to state that the post was the size or character required by law, or that they were of the lawful size; in failing to state that the posts were surrounded by monuments of stone or earth, as by law required; in failing to give such a description of the markings of each corner as would identify the said corners. That this declaratory statement is not verified as required by Section 3612 of the Political Code, in this respect: That it is not verified as to what the size, character or dimensions of the discovery work was; that it it is not verified in so far as describing the corners is concerned (pp. 19-20).

These objections, made in the early part of the case, were not ruled upon at the time, and further evidence was introduced by defendant.

Subsequently there were added objections urged to the introduction of the location notice, as follows:

That the description of the claim, as shown by map which has been introduced in evidence, is altogether misleading, and is in effect no description at all, for the reason that the evidence given here by the surveyor is that Post No. One is the northeast corner; while the declatory statement shows that it is the northwest corner; and that starting from this initial—Post No. 1—the northwest corner; the declatory statement described a claim which would be in effect laid across the claim as shown by the map; that is to say, that this claim, as it now lays, would be turned around, and would lay directly across it.

That this description shows that in a northerly direction from the Post No. 1 all that would be included under this Declatory Statement would be six hundred feet, and that the location as shown on the ground shows fifteen

hundred feet; that there is no evidence to show that corners at a distance of six hundred feet have been marked.

Also for the reason that the proof offered by the defendant shows that a stump was made for a corner, and that a post is described in the declatory statement, and that between the two there is a variance.

Thereupon the court made its ruling as follows:

By the Court: "The location notice offered in evidence is not in certain particulars in accordance with the present statute requirements. The defendant cannot claim title to the premises in controversy after having located the Keyno in the manner indicated by the notice of location, or declaratory statement, which it is required shall be filed with the county clerk and must contain certain verified statements, and as the notice sought to be introduced is lacking the court will sustain the objection to its introduction.

It may be that, if, prior to the commencement of this trial, an amended declaratory statement showing the facts necessary was made and filed in the office of the recorder, such amended statement might have been offered in evidence; that is merely a suggestion, however."

Defendant excepted to the ruling of the court in sustaining the objection to the introduction of the declaratory statement referred to in evidence (pp. 24-25.)

At the conclusion of the testimony the court instructed the jury (pp. 34, 5, 6, 7, 8), and the jury returned a verdict for plaintiff, together with special findings in favor of plaintiff (pp. 40, 41).

It will be observed from the instructions and special findings that the questions submitted to the jury were as to the sufficiency of plaintiff's location, the defendants'

appropriation having been eliminated by the exclusion of the location notice of the Keyno lode claim.

Judgment was entered in favor of plaintiff under the findings (pp. 42, 43).

An appeal from the judgment was prosecuted to the Supreme Court of the State of Montana (p. 53), and the judgment was by the Supreme Court affirmed. The opinion of the court is found at page 54 of the record.

In the course of the opinion relative to the exclusion of the location notice of the Keyno lode claim the court says:

> "The next error alleged is, that 'the court erred in excluding the location of defendant's Keyno claim.'
>
> We have examined this notice of location, and are satisfied that it does not conform to the statute of the State of Montana, or with the construction thereof by this court in the case of *Purdum* v. *Laddin*, 23 Mont., 387.
>
> The question as to the right of the legislature to provide rules for the marking of the boundaries of mining claims and providing for a record of such location, and what the recorded paper must contain, has so long been recognized in this state, and has so many times been approved by this court, that it would be useless to enter again into any consideration of the questions so decided.
>
> We are satisfied, therefore, that the court did not err in excluding the location notice of the Keyno claim."

A writ of error was sued out in this court (p. 60), and the record comes here upon the writ.

ASSIGNMENT OF ERRORS.

I.

The court erred in affirming the ruling of the lower court in sustaining the plaintiff's objections to the introduction in evidence, and in excluding from evidence the location notice or declaratory statement of the Keyno lode claim, offered in evidence by the defendant and appellant.

II.

The court erred in holding that the location notice should contain, in order to be valid, a full description of the markings on each boundary stake used in marking the boundaries of the claim located. It is sufficient if the boundaries be marked on the ground so as to be readily traced, and it is not necessary that such markings be set forth in the record.

III.

The court erred in holding that the Statutes of Montana (Sec. 3612 of Political Code) was valid and mandatory in requiring the record of a quartz claim to contain the dimensions and location of the discovery shaft and the location and description of each corner, with the markings thereon.

IV.

The court erred in holding that the requirements of the Statutes of Montana, as to the record containing a description of the corners with markings, and as to the dimensions and location of the discovery shaft, were not in conflict with the Statutes of the United States, and invalid.

V.

The court erred in holding that the laws of the State of Montana were not in contravention of the Statutes of the United States, which provide (Sec. 2323):

> "All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

VI.

The court erred in holding that the Statute of Montana provides that the record of a quartz claim shall contain the description of the markings upon the boundary stakes was valid and controlling and mandatory, for the reason that such statute is not only in conflict with laws of the United States, but interferes with the primary disposition of the soil by the Federal Government, and imposes restrictions upon such disposal.

VII.

The court erred in holding that the Statute of Montana was mandatory and valid which required the record of a claim to contain the markings upon boundary stakes, for the reason that such statute is unreasonable, and unnecessarily restrictive in providing that evidence shall be incorporated in the record. Such record would accomplish no good purpose, but would unjustly and unnecessarily interfere with the disposition of lands by the general government.

VIII.

The court erred in holding the State Statute to be operative and effective, so far as it attempts to prescribe what shall be contained in a record of mining locations, for the reason that such requirements are set forth in the Federal Statute, and no authority has been given to the state to legislate upon the subject

POINTS AND AUTHORITIES.

Without following the assignments specifically we propose to submit to the court the questions therein raised under the following heads:

First. Can Congress delegate to the state the right to legislate upon the sufficiency of a record or location of a mining claim?

Second. Has Congress ever delegated any such power.

Third. If Congress has delegated such authority the act of the state becomes the act of Congress, and must be construed by this court.

I.

Can Congress delegate to a state the authority to legislate upon the sufficiency of records of location of Mining Claims, that being one of the steps in the disposition of public lands?

The question here presented is one that has been agitated almost continually in Montana since the enactment of the mineral laws. Upon various occasions the question has arisen before the Supreme Court of the state, in one manner or another, and that tribunal has held that the law delegating such authority was authorized. The court at first had but little hesitancy in giving force to the State Statute, which prescribed certain requisites for mining locations, and particularly that requirement prescribing an affidavit to the notice of location.

In a very recent case, however, the Supreme Court of the state, while sustaining the validity of the statute of the state, expresses very grave doubt as to the correctness of its decision. In referring to its previous decisions where they were all recited and reviewed the court says:

> "We cannot say that we have an 'abiding conviction' that these decisions are erroneous, but at most only that we have serious doubts as to their correctness. * * *
>
> We therefore, while entertaining very serious doubts as to the correctness of this court's past rulings, in consideration of the circumstances above set forth, must refuse to declare the legislative action of the State of Montana unconstitutional."
>
> *Mares* v. *Dillon*, 75 Pac. Rep., 963, decided by the Supreme Court of Montana, March 21, 1904.

The identical question was presented and decided in that case as in the one at bar, and was presented in almost identically the same manner, viz., as to the validity of a location notice of a mining claim.

The case of *Mares* v. *Dillon* has been taken to this court upon a writ of error, and is now pending herein, as *Dillon* v. *Mares*, No. 693.

The claim of authority in the state to legislate upon the requirements of records of mining claims is derived from Section 2324 of the Revised Statutes, which reads as follows:

> "SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: the location must be distinctly marked on the ground, so that its

boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

As to whether this statute confers the authority upon the state or upon the miners of the district, or upon both, we shall discuss hereafter. At present we are interested in ascertaining whether Congress can confer any such authority.

Assuming that authority was granted by the Congressional Act, the legislature of the state proceeded to legislate upon the subject by enacting Section 3612 of the Political Code, which section we will quote in a subsequent part of this brief.

Under the present head we propose to submit that the right of disposal of the public domain is by Section 3, Article IV., of the Constitution, vested in Congress, and in Congress alone, and that it cannot be by that body delegated to any state; that any attempt to delegate the power would be a nullity, and beyond the constitutional powers of Congress. Any assumption of such power by the state, through the legislature or otherwise, whether under a grant or delegation from Congress, or by nakedly assuming the authority, would likewise be a nullity.

We submit that the law of the state regulating the location of mining claims, which is the disposition of the public domain, is unconstitutional, and beyond its reserved or granted powers. As we shall hereafter show, the State of Montana, by the act in question, and particularly as construed by the Supreme Court of the state, has undertaken by legislation to control in the most minute details, and in the most unreasonable and unnecessary

manner, the location of mineral lands, and by so doing has, to all intents and purposes, nullified the acts of Congress. It has put restrictions on the act which sets at naught the liberal character of the act and requires useless and harrassing details to be set forth in the record of the claim, which, under the act of Congress, are not required, and are non-essentials under any considerations of the matter. By thus doing the state undertakes to control such disposition of these lands, or if it does not control such disposition its act becomes a serious hindrance and obstacle to the application of the congressional act which undertakes to make such disposition.

We dare say that had Congress undertaken to delegate to the state authority to in any wise regulate or control the disposition in the slightest degree, or in any requisite, of the agricultural lands of the United States that any such statute would have instantly met with the most vigorous protest. We cannot conceive that any such legislation would for a moment be contemplated with reference to the public domain, except in the case of mineral lands. The conditions which brought about the interference of the local authorities and the state, in the disposition of those lands, arose undoubtedly from the mining customs and regulations of mining districts, when mineral was first discovered upon the public domain, and under which the miners regulated the extent and manner of appropriations, and condition of holdings, among themselves. In the absence of congressional law, these rules were recognized by the courts, not as constituting titles, but simply regulating the rights of possession, and the right to acquire the title from the general government.

As we shall hereafter contend and attempt to show, it

is the local right of regulation in the miners themselves, which has been attempted to be preserved by the Congressional Mining Laws, and that there is no semblance of such authority given to the state. But for the present the discussion will proceed upon the assumption that the Congressional Act attempts to confer such authority upon the state.

The grant contained in the mineral laws of Congress is more than the right of possession. It is to all intents and purposes a grant of the land,—such grant to become absolute upon the prosecution of the claim to final patent, or to lapse upon the failure to comply with the provisions of the law in certain particulars. Whatever might be the ultimate result of the congressional grant,—whether it shall mature into a patent or lapse from failure to subsequently comply with the law's provisions while it existed and was maintained, it constituted a present and well ascertained ownership in real property. In other words, it is the grant of the title from the government for the time being. Until it should be lost the right of possession and limited ownership is in the locator. This doctrine was first announced in the case of *Belk* v. *Meagher*, 104 U. S., 279, and has never since been qualified or modified in the slightest. In the course of the opinion in that case, by Chief Justice WAITE, it is said:

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. *Forbes* v. *Gracey*, 94 U. S., 767. There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant from the United States. The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of

> their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for mineral separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States."

It is, therefore, apparent that the rights granted under the act are very much more than mere mining rights. That it is at least a grant of some estate in the public domain. The question then arises: Can Congress, in making this or any disposition of the public domain, call to its assistance, or delegate to, a state, the regulation of any part of the proceedings by which that grant is perfected? We submit it cannot.

The power of the disposition of the public lands is vested in Congress by the Constitution. Section 3, Article IV of that instrument provides:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It is under and by virtue of this provision that Congress is vested with authority to regulate the disposal of the public lands. The authorities are uniform in so holding, and we content ourselves by citing without quoting at length from them.

Pollard v. *Hagan,* 3 How., 224.
De Lima v. *Bidwell,* 182 U. S., 197.
Jourdan v. *Barrett,* 4 How., 169, 185.
Russell v. *Lowth,* 18 Am. Rep., 389.
United States v. *Hughes,* 11 How., 552, 568.
United States v. *Gratiot,* 14 Pet., 526, 537.
United States v. *Fitzgerald,* 15 Pet., 407-421.

11 Story on the Constitution, 1328.
11 Tucker on the Constitution, 605.

We quote from the foregoing citation of Story on Constitution, as follows:

> "The power of Congress under this section (Section 3, Article IV), is clearly exclusive and universal and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulation in the cessions."

The following authorities not only hold that the power of disposition is in Congress, but that the states have no authority whatever in the matter.

Irvine v. *Marshall,* 20 How., 558.
Wilcox v. *Jackson,* 13 Pet., 498.
Gibson v. *Choteau,* 13 Wall., 92-104.
Seymore v. *Sanders,* 3 Dill., 437 (12, 690).
Russell v. *Lowth,* 21 Minn., 167.
Miller v. *Little,* 47 Cal., 348.
Van Brocklin v. *Anderson,* 117 U. S., 151-167.
Cross v. *Harrison,* 16 How., 164.
Headley v. *Coffman,* 56 N. W., 701-703.
Chapman v. *Quinn,* 56 Cal., 266, 292.
Kissell v. *St. Louis,* 18 How., 19.

We think the rule is too well settled in the decisions and in practice to be controverted.

If, then, the power of disposition is in Congress, has Congress the right to delegate that power? The Constitution does not give it the authority to delegate it. If it has the power it is an inherent one. That it has such inherent power, cannot be maintained. The authorities, we think, are practically uniform in holding that a

legislative body has no power of delegation in the matter of making laws.

Cooley on Constitutional Limitations, 137 (6th Ed.).

Field v. *Clark,* 143 U. S., 649.

Wayman v. *Southard,* 10 Wheat., 48.

Re Rohrer, 140 U. S., 545.

In the last case, the court says:

> "Nor can Congress transfer legislative power to a state. * * * It does not admit of argument that Congress can neither delegate its own power, nor enlarge those of a state."

We have taken the authorities hereinbefore cited from the brief of plaintiff in error, in the case of *Dillon* v. *Mares,* now on file in this court as No. 693. Counsel for the plaintiff in error in that case, has submitted in his brief a lengthy and able argument upon the question here presented, and we ask the court, out of deference to him and his client's rights, to give his brief consideration in the decision of this case, if it shall be decided before the presentation of that case.

We respectfully submit that Congress could not delegate to the State Legislature, the right to enact laws regulating the disposition of the public lands, and that the state law in question does regulate the procedure by which the public lands are intended to be appropriated. The state law is, therefore, void, and the Supreme Court erred in declaring a location void which complied with the Congressional law, but did not comply with the State law.

2d. *Has Congress ever delegated, or attempted to delegate, to the state, the authority claimed to have been exercised?*

Conceding, for the sake of argument, that Congress might delegate to the state authority to control or regulate the record of mining claim locations, and what may or must be therein contained, the next question for consideration is, Has Congress actually conferred such power?

This whole case turned on the sufficiency of a location notice under which the plaintiff in error claims to have acquired a right in certain mining property. It was contended by the defendant in error, and held by the court, that the location notice having failed to describe the discovery shaft of the claim, and having failed to incorporate in the notice for record certain inscriptions on the corner or boundary posts, as required by the Montana law, that the plaintiff in error's attempted location became absolutely void, and that no proof could be received of his appropriation, although such proof might show a complete compliance with every requirement of congressional or state law in every other respect. Has Congress ever conferred, or attempted to confer upon the state, power to enact any such law? We think not.

The only authority attempted to be conferred by Congress with reference to the recording of location notices of mining claims, is found in Section 2324, of the Revised Statutes, which reads as follows:

> "Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: the location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name

or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Section 2319 of the Revised Statutes, reads as follows:

"Sec. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, *and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.*"

We copy from Section 2322, as follows:

"Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs, and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, *so long as they comply with the laws of the United States and with state, territorial, and local regulations, not in conflict with the laws of the United States governing their possessory title,* shall have the exclusive right of possession, and enjoyment of all the surface included within the lines of their locations," etc.

It will be observed that the authority here conferred is to "the miners of each mining district." Whether Congress has the right to confer the authority upon the miners, we cannot stop to inquire; but there is certainly not conferred upon the state, either expressly or impliedly, any authority to regulate or prescribe the requisites of the location or record of a mining claim. The power which the state has attempted to exercise is im-

portant, and seriously affects the government's grant. We think it is quite well established that Congress could not expressly confer the power. How much less, then, can the state assume it without an express and explicit grant?

It will, of course, be contended that there is an implied authority given, wherein it is provided that the miner's regulations must not be "in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated." The most that can be claimed by this provision, is that it restricts the miners. It does not pretend to confer any rights of legislation upon the state. When it is so well established by unbroken authority that the right of legislation vested in a political body cannot be by that body delegated, it would be a most illogical conclusion to say that such a right had been delegated in so equivocal a manner. The state certainly stands without any pretense of express authority. We submit that it would be a far call to find in this statute an implied authority.

Without conceding the power of Congress to confer upon the miners the authority designated in the act of Congress, it seems to us that the evident purpose of the act was to confer upon the miners and not upon the state certain specified rights or powers of regulation. These regulations must not be in conflict with the laws of the United States; nor must they be in conflict with the laws of the state. Here must be interpolated into the statute a clause or provision that such regulations must not be in conflict with the laws of the state "governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim." Such is not the expression of the act. It simply declares that the miners

shall not make regulations in conflict with the laws of the state. Not necessarily with reference to location, recording, and assessment work, but upon any rightful subject of legislation. For instance, it might be imagined that the state might make laws controlling the formation of districts, the place where records should be kept, and when made and how preserved, and their evidentiary effect, and the like. These might be subjects of rightful legislation in the state, and yet not trench upon the powers granted by Congress to the miners. We do not care, however, to be understood as admitting such to be the case.

We submit that, in view of the lack of power in Congress to give to the state the authority attempted to be exercised, it is entirely admissible to hold that Congress intended to subject the miners to only such laws as the state could rightfully enact, and not to expressly confer upon the state authority to regulate the disposal of the public lands of the Federal Government.

In the brief of defendant in error reliance is placed on the case of *Erbhardt* v. *Boaro,* 113 U. S., 527, as an authority to the effect that the state may legislate upon these subjects. It is true in that case this court did discuss the Colorado statute as if it were effective and treated it as if it were legislation authorized by Congress.

But, in that case, there was no discussion of the power of the state to enact such a law. The authority of the state was assumed as a matter of course, and there was no contention to the contrary.

We, therefore, submit that the state was not authorized to pass a law defining the requisites of a record

of mining claims; that such authority is vested only in the miners.

3d. *If Congress did delegate the authority to the state, the act of the state, the agent, becomes the act of the National Government, the principal, and is to be finally construed by this court.*

This proposition seems too plain to be disputed. We cannot conceive that it is possible that Congress can delegate its powers; but, if it can, the laws of agency must apply, and the state's action must become the action of the Federal Government, its principal; otherwise, the state may control, as we shall see, in the disposition of the public lands, which is a congressional right only, and the Supreme Court of the state may construe finally the state laws in such a manner as to divest the National Government of its entire authority.

We, therefore, submit, that if the state's authority in this matter is to be upheld, that the act of the state, its statute, is subject to a final review by this court, and that review must be assumed for two reasons: 1st. Because the act is the act of Congress through its agencies; and, 2d. This court must look to it that the acts of Congress, the supreme law in this matter, are not nullified or qualified by the statutes of the state. For, conceding the right of the state to act under authority of Congress, the act or statute must be in conformity with the letter and spirit of the congressional act and not in conflict with it.

We are confident that the state statute, with the construction put upon it by the State Supreme Court, is in direct conflict with the congressional act, and to that extent certainly void. If the state has a right to enact the statute, its construction is with this court; and, if it is,

we submit that the construction put upon the statute by the Supreme Court of the state is not correct, and that such construction unreasonably interferes with the disposition of the mineral lands, and is against the liberal spirit of Congress in enacting the mineral law, and that this court will overrule the Supreme Court of the state and put a liberal construction upon the state statute, to the end that it will not stand in conflict with the letter nor repugnant to the spirit of the act of Congress.

Section 2324, from which we have before quoted, expressly provides that the right of regulation shall be subject to the following requirements:

> "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim located, by reference to some natural object or permanent monument as will identify the claim."

The Montana statute undertook to supplement this by the enactment of Section 3612 of the Political Code, which reads as follows:

> "Within ninety days of the date of posting the location notice upon the claim, there must be filed in the office of the county clerk of the county in which the lode or claim is situated, a declaratory statement, which must contain:
>
> "1. The name of the lode or claim.
>
> "2. The names of the locator or locators.
>
> "3. The date of location, and such description of the location of said claim with reference to some natural object or permanent monument as will identify the claim.
>
> "4. If a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be.

"5. If a placer or mill-site claim, the number of acres or superficial feet claimed.

"6. The dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims.

"7. The location and description of each corner with the markings thereon.

"Such declaratory statement must be verified by the oath of the locator, or one of the locators, and in case of a corporation, by an officer thereof duly authorized to act."

The second and third subdivisions only are in accord with the congressional act. The first, fourth, fifth, sixth and seventh subdivisions require matters in addition to that of the laws of Congress. It will be observed that the sixth and seventh subdivisions require that the record shall contain the dimensions and location of the discovery shaft, and the location and description of each corner with the markings thereon.

The question arose in the present case as follows: The defendant below and plaintiff in error here proved by witnesses the discovery of a mineral vein upon the premises, and the marking of the boundaries so that they could be readily traced upon the ground, and the posting of the notice upon the ground. In short, the proof showed a full compliance with the Federal statute in making the location up to the recording of the claim. Then was offered in evidence the record of the claim, and thereupon it was objected that the location notice did not conform to the requirements of the Montana statute, in that it did not give the dimensions of the discovery shaft or the size or markings of the corner posts. Numerous other objections were made, but these are the objections which were sustained. The court, as we have before shown, held the objections good and excluded the

location notice, thus effectively disposing of defendant's (plaintiff in error's) claim to the ground.

The Supreme Court of the state, in the case of *Purdum* v. *Laddin*, 23 Mont., 387, and in the present case, held these requirements of the statute to be mandatory, and unless they should be complied with, the attempted location, should be held void.

It cannot be disputed that everything which could have been done to perfect a location had been done. At least there was sufficient evidence to go to the jury. The court held, that these facts could not go to the jury, for the reason that certain other things had not been incorporated in the notice of location, and, therefore, held the location void.

The locator performed every act required by the act of Congress; he made a record within time, containing every statement required by the congressional law; the names of the locators, the date of the location, and a description of the claim with reference to such natural objects and permanent monuments as would identify it. And yet, because he failed to give the dimensions of the discovery shaft—an unimportant matter—and to give the markings upon the stakes, which defined the boundaries of the claim (also absolutely unimportant facts under any view of the matter), it was held that proof could not be received of his appropriation.

That the discovery shaft was sufficient, and that the markings on the stakes were all that the law required, makes no difference, so the court holds. There descriptive matters must be incorporated in a record before they can be proved.

The statute, as construed by the State Supreme Court, in effect says:

A compliance with all requirements of the United States law is not sufficient to establish a location; the record, when made, must not only contain all that the laws of Congress require, but it must contain minute evidence of the size of the discovery shaft (which should be held immaterial), and the very markings on the boundary stakes (which are not only immaterial, but may be untrue and misleading).

Had the record of location declared that certain markings were upon these boundary stakes, the notice must have been held sufficient in itself, and the facts submitted to a jury, although there might have been no truth whatever in the statement of record. How inconsistent it seems to say that though every fact may have been sufficint, the locator shall lose his rights because he did not put of record an immaterial fact. The law, as construed, makes the merest technicality substantial, and declares the most substantial things to be of no value.

After requiring all these things to be incorporated in the notice of location, the record thereof is not even made *prima facie* evidence of the facts therein stated. Had such effect been given the record, there might be some reason for such requirements. Then it could be held that the record, in the absence of a compliance, should lose its *prima facie* evidentiary character; but, as the law has been construed, the omission is held to be fatal to the location.

Such a construction practically interferes with the power of Congress in the disposition of the soil. If the state has authority to make regulations governing the records in such cases, that means, that it may *within reason,* exercise such power. It does not mean that it may impose foolish and useless restrictions. As well

might the state require a chemical analysis of the ores, or the width of the vein, or the character of the country rock to be set forth in the location notice. All of these things are usually proved upon every trial involving the validity of the location, but they are not absolute essentials, and certainly have no place in the record. We submit, that the law which requires such non-essential things to be recorded, as this law does, is unreasonable and a serious and useless restriction and imposition upon the locator who has complied with the mineral requirements of the United States statute.

This case is not unlike that in which a state law might prescribe that every deed executed should contain minute description of the monuments with the inscription thereon. As between parties to a deed, where the statute has not been literally complied with, would the deed be held void? Is not a location a grant from the government to the locator? Can it be destroyed for such trivial causes? In other words, would not and ought not such requirements to be held directory? Which means, that they are not and were never intended to be essentials.

If they are not essentials and serve no reasonable purpose, has the state the power to impose them upon the locator? Are they not an undue and useless interference on the part of the state with the grant made by the government to the locator? Do they not conflict with the laws of Congress and with the broad spirit which ought to and always has prevailed in the construction of this congressional act?

Mr. Lindley, in the second edition of his work on mines, at Section 381, discusses the liberal construction of the congressional law and the actions of the locators thereunder as laid down by all the courts, as follows:

"In the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices required invariably receive at the hands of the courts a liberal construction. The mining laws are 'to be expounded with as little differentiation as may be between former known actual customs of miners and the formulated expressions of Congress based upon those customs in present positive law.'

"'The courts always construe these notices liberally, and if, by any intendment, the proof can be reconciled and made consistent with the statement contained in them, the jury will be allowed to say whether or not, upon the whole proof, the identification is sufficient.'

"To hold the locator to absolute technical strictness in all minor details, would be practically to defeat the manifest end and object of the law. The pioneer prospector, as a rule, is neither a lawyer nor a suveyor. Neither mathematical precision as to measurement, nor technical accuracy of expression in the preparation of the notices is either contemplated or required. The law being designed for the encouragement and benefit of the miners, should be liberally interpreted, looking to 'substance, rather than shadow, and should be administered on the lines of obvious common sense.' Mere imperfections in the certificate will not render it void.

"As was said by the Supreme Court of Utah:

"'If by reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.'

"In matters of description, calls that are erroneous will not destroy the validity of the notices or certificate, if by excluding them a sufficient description remains to enable its application to be ascertained.

"Thus, where a certificate of a location specified its *situs* as being in the wrong county, it being otherwise valid, and have been recorded in the right

county, the erroneous statement was mere surplusage, and as such was rejected.

"In the absence of a local requirement to that effect, the certificate need not state either the district, county, or state in which the location is situated.

"And where a state statute requires two notices, one preliminary and the other final, if the former contained the name of the county, and the final one omitted it, but refers to the preliminary notice, the defect is cured.

"The position of the monuments as built upon the ground may be described in such a way as to direction as to be confusing. But if the other statutory requirements were complied with the notice would be sufficiently correct to allow its admission in evidence.

"A mistake in the certificate as to the direction and course, such as 'northerly' instead of 'northeasterly,' the description being aided by monuments on the ground, is of no moment.

"The certificate is not required to show the precise boundaries of the claim as marked on the ground, but it is sufficient if it contains directions, which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace the lines.

"The object of any notice at all, being to guide the subsequent locator, and afford him information as to the extent of the claim, of the prior locator, whatever does this fairly and reasonably should be held to be a good notice. Great injustice would follow if, years after a miner had located a claim, and taken possession, and worked upon it in good faith, his notice of location were to be subject to any very nice criticism."

How in conflict with these broad principles is the state law under discussion?

In note 2 to this section, at page 701, the author notices the case of *Purdum* v. *Laddin*, 23 Mont., 387, and says:

"The adoption in Montana of a more exacting law (Pol. Code of 1895, Sec. 3612) has rendered the earlier Montana cases inapplicable in that state."

In other words, a state statute makes it necessary to put a harsh construction upon this beneficient act. In itself it was liberal and liberally construed. The state statute necessitates a hard and harsh construction. The purpose of the act has been overthrown and its character destroyed by a state law. This means that the state law is invalid, as being in conflict with the superior law, the statutes of Congress.

If the law means what the Supreme Court of Montana says it does, it is clearly in conflict with the spirit, and letter too, of the mining laws of the general government, and, we submit, should be so held.

In no state, so far as we know, have such restrictive laws been passed as in Montana, and we submit that any such tendency should be checked. It is against the liberal spirit of the national law, and if permitted to proceed will eventually hedge that law in with impossible conditions. Records are intended for notice only, and when a record contains those requirements prescribed by the laws of Congress it gives all the notice necessary. At most, the "manner" of recording is all that has been delegated either to the state or to the miners. The contents of the notice should be left where the laws of Congress fix them.

The defendant in error thinks the law of the state should be sustained because it goes only to the manner of proving facts in the state court, and as establishing a rule of evidence. As has been before pointed out, this is not the effect of the law. The record prescribed by the state law when made is valueless as evidence. No

presumption attaches to the statements contained in the record. Under the law, the record serves only as notice, and in all controversies the facts must be proved as other facts are proved.

We respectfully submit that the court erred in its rulings, and that the location notice should have been admitted in evidence and submitted to the jury.

We ask, therefore, that the cause be reversed and sent back for a new trial.

Respectfully submitted.

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FORBIS & EVANS,
Of Counsel.